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NO. _____

in the

Supreme Court

of the

United States

OCTOBER TERM, 1980

PETER PIAMBINO, et al.,

Petitioners,

vs.

WILLIAM E. BAILEY, et al.
and DAVID SYLVA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 3, 1980

QUESTIONS PRESENTED

1. Whether the court below erred in its application of the *Howey/Forman* test for an investment contract to be a security by emphasizing the *quantity* of work expected to be performed by the *investors* rather than the *quality* of the efforts to be performed by the *promoters*.

2. Whether the court below erred in its findings that for private lawsuits the Securities Exchange Act does not constitute an "expressly authorized" exception to 28 U.S.C. §2283, and that the 42 U.S.C. §1983 exception to 28 U.S.C. §2283 is not available for the protection of property rights.

LIST OF PARTIES

The following listed persons were parties in the procedings below:

NAME	INTEREST
Peter Piambino	Plaintiff
Joseph F. Kucklick	Plaintiff
Marilyn Koslen	Plaintiff
Robert M. Ernst	Plaintiff
Michael J. Gardner	Plaintiff
James D. Small	Plaintiff
All persons who purchased or invested in Director Distributorships during the period from March 7, 1980 through August 10, 1973	Members of the Plaintiff Class
Bestline Products, Inc.	Defendant
Bestline Corporation	Defendant
William E. Bailey	Defendant
David L. Eastis	Defendant
Jerry G. Brassfield	Defendant
Robert Depew	Defendant
Leo Diel	Defendant
Charles Simmons	Defendant
Larry D. Huff	Defendant
Larry S. Huff	Defendant
James Rohn	Defendant
Towru Ikeda	Defendant
Steve C. Stern	Defendant
James K. Hisler	Defendant
Ralph Flynn	Defendant
Martin Day	Defendant

Norman Miller	Defendant
Joseph Cotroneo	Defendant
Richard Dumont	Defendant
Saul Tave	Defendant
Richard Lub	Defendant
Jerry J. Weiss	Defendant
Davis Soto	Defendant
Keith Fox	Defendant
Oliver P. Colvin	Defendant
Tink Anderson	Defendant
Frank Brendis	Defendant
David T. Gibson	Defendant
Gordon Blaum	Defendant
Edna Blaum	Defendant
Richard Grillo	Defendant
Melvin Moran	Defendant
Richard G. Kruse	Defendant
Blair R. Egli	Defendant
Neal Morehart	Defendant
Peter Eiselstein	Defendant
Bert Hardcastle	Defendant
Alfred G. Moravec	Defendant
Kenneth Davis	Defendant
Norman Evans	Defendant
Carroll Gentry	Defendant
Robert E. Johnson	Defendant
Robert L. Shell	Defendant
C.D. St. Peter	Defendant
James Herbert	Defendant
Donald Omholt	Defendant
Sten Tallarida	Defendant
Willie Larkin	Defendant
Frank Conti	Defendant
Andi Dias	Defendant

Marvin Sternberg	Defendant
E. J. Beckman	Defendant
Kenneth Lutz	Defendant
Edward Buck	Defendant
John Wolfe	Defendant
Robert Schuster	Defendant
Robert Richards	Defendant
William Gelfound	Defendant
Lennart Osterman	Defendant
Jan B. Bailey	Defendant
Janin, Morgan & Brenner, a partnership	Defendant
Janin, Morgan & Brenner, a corporation	Defendant
Frank Interdonato	Defendant
George Wunch	Defendant
Robert Burke	Defendant
Wisconsin Attorney General's Office	
New Jersey Attorney General's Office	
Pensylvania Attorney General' Office	California Restitutionary Program
Missouri Attorney General's Office	
Texas Attorney General's Office	
California Attorney General's Office	
New York Department of Consumer Affairs	
David R. Sylva	Intervenor
Bank of America, N.T. & S.A.	Trustee, California Restitutionary Program

All persons eligible for distributions from the California Restitutionary Program	California Restitutionary Program
Securities & Exchange Commission	Amicus curiae

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitoners, Peter Piambino, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 6, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, James Lawrence King, J., is printed in Appendix D hereto and is reported at 412 F.Supp. 732. The opinion of the United States Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court, is printed in Appendix E hereto and is reported at 610 F.2d 1306.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 6, 1980. Timely petitions for rehearing and rehearing en banc are printed in Appendix C hereto and were denied on June 5, 1980. Appendix A. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under §22(a) of the Securities Act of 1933, 15 U.S.C. §77a et seq., and §27 of the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq.

Plaintiffs brought this class action suit under Rule 23, F.R.Civ.P., against the Bestline corporations and various officers of the corporations alleging that the "Bestline Direct Distributorship" was an "investment contract" or "security" under the federal securities laws. It was alleged that the sale of the Bestline Direct Distributorship was both unregistered and fraudulent.

On April 29, 1974, the Judicial Panel on Multi-District Litigation transferred a number of similar cases to the Southern District of Florida for consolidated pretrial proceedings. Class action status was certified by the District Court on November 22, 1974.

After approximately twelve months of extensive discovery, Plaintiffs moved the District Court pursuant to Rule 56, F.R.Civ.P., to enter partial summary judgment on the sole issue that the Bestline Direct Distributorships were "securities" in the nature of "investment contracts." This motion was granted by the District Court on March 19, 1976. *See,* 412 F.Supp. 732.

In the meantime, within days after this suit had been filed in the Southern District of Florida, the California Superior Court in Los Angeles County entered judgment against the Bestline corporations upon a complaint filed by the California Attorney General alleging violation of various California statutes in connection with the operation of the Bestline pyramid franchising scheme including the sale of Bestline Direct Distributorships. On December 21, 1973, this judgment was modified by the California Superior Court upon stipulation by the California Attorney General and the Bestline corporations. The modified judgment established a restitutionary plan for the benefit of Bestline Direct Distributors residing in California and Bestline Distributors in other states if Bestline agreed to their inclusion in the California plan. The Restitutionary Program provided for periodic payments to be made by Bestline to a trust for ultimate distribution to California distributors. The Plaintiffs in this action, as well as the great majority of Bestline

Direct Distributors throughout the United States, were never given an opportunity to participate in the California plan.

During the course of these proceedings, Plaintiffs presented evidence to the court that Bestline's assets were being dissipated and removed to foreign countries where levy on execution would not be possible. In fact, on April 9, 1976, an Assistant California Attorney General appeared in the District Court in Florida and acknowledged to the trial court that the California Superior Court and the California Attorney General had allowed Bestline to pay out more than one million dollars into another pyramid franchising fraud restitutionary plan with which Bestline was entirely unaffiliated. Subsequently, on June 18, 1976, Plaintiffs filed their First Motion for Temporary Restraining Order whereby Plaintiffs sought an order prohibiting Bestline from transferring any funds or other things of value to the California Restitutionary Plan or to any other person, firm or corporation except in the ordinary course of business for a tangible value received.

On June 30, 1976, a hearing was held on Plaintiff's First Motion for Temporary Restraining Order. Again, an Assistant California Attorney General appeared at the hearing and explained the operation of the California plan in detail to the trial judge. As a result of the hearing, the trial court enjoined Bestline from making further payments to the California plan pending further order of the court and entered its Preliminary Injunction on July 7, 1976. Appendix B. The trial court also ordered Bestline Products, Inc. to pay into the registry of the court the sum of $500,000 which the corporation held for anticipated payment to the California Restitutionary Plan.

All of the above events occurred well before the settlement discussed in the Circuit Court's opinion appearing at 610 F.2d 1306.

The specific facts of this case are set forth in detail in the District Court's opinion appearing at 412 F.Supp. 732 and in the Circuit Court's opinion appearing at 610 F.2d 1306. Although Petitioners do not necessarily agree with the Circuit Court's characterization of events, all of the facts pertaining to the issues raised on this Petition are accurately reported in the published opinions.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other Courts of Appeals and of the Supreme Court as to the Definition of a Security.

The securities laws were enacted by Congress to provide protection of the general public and investors, including uninformed, gullible, ignorant and little investors. This protection extends to all securities, whether registered or not.

In the instant case Petitioners represent a class consituting a substantial segment of the national economy. Thus the decision of the Court of Appeals has country-wide impact. Additionally, the Bestline investment scheme is of a generic type malignantly resurfacing periodically and particularly requiring regulation under the securities laws.

The decision below frustrates to a substantial degree the enforcement and administration of the securities laws by constricting the statutory definition of "security". Clearly the extent of application of the entire body of federal securities laws depends upon the interpretation applied by the courts to the word "security". The Court of Appeals' rejection in the instant case of liberal, flexible tests as laid down by this Court in defining "security" effectively curtails and restricts the regulation intended by Congress. If the interpretation of the panel below is permitted to stand, it would serve as a guide to the crafty pent on evolving sophisticated schemes to mulct the investing public by circumventing the protections to investors provided by Congress when it enacted the securities laws.

Although enforcement of the securities laws is primarily lodged in the Securities & Exchange Commission, the role of private litigants such as Petitioners as ancillary enforcers is firmly established in achieving the broad social policies underlying the securities laws. Potential violators are deterred from illegal conduct by exposure to liability when defrauded investors call them to account. The beneficial effect of such potential enforcement has long been recognized in securities litigation.

The protections afforded by the securities laws were intended to apply whenever the investing public is asked to contribute money in the anticipation of profit and which places the investor's risk in a position of direct dependence on the success of the common enterprise managed by others.

This Court has often noted that the statutes should be liberally construed to achieve their obvious purpose of protecting investors. The test for determining whether a particular investment scheme is within the coverage of the securities laws must turn on "economic reality" so that "[t]he statutory policy of affording broad protection for investors [will] not be thwarted by unrealistic and irrelevant formulae." *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298, 301, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946).

Investor protection is as necessary here as it was in *Howey*, and as it is in the case of any of the myriad schemes invented by con artists to entice the unwary into parting with their money. An examination of Bestline's own sales literature demonstrates quite vividly that the Bestline Direct Distributorships were offered as a medium for investment. The Bestline Opportunity Meetings "emphasized the building and supervisory aspects of the business, with which Bestline promised 'plenty of help'." 610 F.2d at 1319. The Court of Appeals went astray when it inferred:

> The assurances of "plenty of help" infers that the person receiving the help would also have to be exerting efforts of his own, else there would be no need for help. "We all work together on this" could be construed as notice that it would be necessary for the "investors" to "work". 610 F.2d at 1319.

The court below erred in placing significance on the possibility that the investor might be required to work.

While it is true that this feature created an additional potential source of income for the investor and even shifted a portion of the investment risk (success of the common enterprise) to the investor, it did not alter the essential nature of the transaction or remove the need for protecting investors through disclosure and regulatory provisions of the securities laws.

The Court of Appeals' decision is particularly important to the administration of the federal securities laws because of the uncertainty it injects into the interpretation of this Court's definition of "investment contract." The effect of the decision below would be to permit pyramid schemes to thrive without complying with the statutes enacted by Congress for the protection of investors merely because it would be necessary for the "investors" to "work". Petitioners submit that contrary to the view of the Court of Appeals, this Court's decisions in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 40 L.Ed.2d 621 (1975) and *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979) do not sanction such a result. In any event, whether or not they do is an important question in the administration of the federal securities laws which this Court can and should resolve.

The Fifth Circuit Court of Appeals specifically found that there were two distinct aspects of the distribution system set up by Bestline, just as there had been in *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974); *SEC v. Glenn W. Turner Enterprises,*

Inc., 474 F.2d 476 (9th Cir. 1973), *cert. denied* 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973); *SEC v. Galaxy Foods, Inc.*, 417 F.Supp. 1225 (E.D.N.Y. 1976), *affirmed* 556 F.2d 559 (2d Cir. 1977) and *Bell v. Health-Mor, Inc.*, 549 F.2d 342 (5th Cir. 1977). 610 F.2d at 1318. These two aspects were described as the "*retail sales* portion of the business on one hand and the recruiting portion on the other." 610 F.2d at 1318. The Circuit Court noted however:

> As in the case with most such pyramid sales schemes, however, the lure of big profits came not from the opportunity to sell Bestline's products to the consuming public but from the opportunity to recruit others who would in turn recruit or sell. 610 F.2d at 1310.

The decision then concluded that "different inferences could be drawn from the facts in the record as to whether the Bestline Direct Distributorship Plan could be separated into two parts" and that "different inferences could be drawn from the facts in the record as to whether anticipated profits were to come solely by Bestline's efforts, with no substantial personal effort on the part of the 'investor'." 610 F.2d at 1319. However, it was recognized in *Bell v. Health-Mor, supra*, "that income opportunity can be considered independently of any sale of a product or service which might have been made." 549 F.2d at 346. Of course, under the authority of *Koscot* and the other cases cited by the Circuit Court, the test is not whether anticipated profits were to come "*solely* from Bestline's efforts with no substantial personal effort" by the investor, but whether Bestline

was to provide the "essential managerial efforts which affect the failure or success of the enterprise." *See SEC v. Koscot Interplanetary Inc.* 497 F.2d at 483.

The argument that the pre-purchase Direct Distributors were repeatedly advised of the hard work and effort necessary to establish a thriving business and that this "fact" — which is emphasized in the Bestline promotional materials — precluded summary judgment on the question of what reasonable investors might have believed as to the efforts that they would be required to exert, ignores the thrust of the bifurcation of the retailing and recruiting elements of the enterprise. The legitimacy of the retailing aspect of the Bestline business, and the extent of any efforts expected of the distributors in connection with the retail business, are simply not relevant to the issue considered by the District Court — whether profits were to result from the recruitment of pre-purchase Direct Distributors. Significantly, there is no contention that the promotional materials suggest that pre-purchase Direct Distributors were required to contribute any substantial efforts to the recruitment of other distributors. Indeed, the Bestline standardized presentations explained to prospective investors that they could receive substantial profits merely by inviting guests to Opportunity Meetings.

Nor does the operation of the plan as explained in the Bestline Information Manual suggest that investors' efforts were managerial or entrepeneurial in the recruiting area. To the contrary, the Manual represented, through the use of vivid examples and suggestions, that profits would be made from

recruitment *without* managerial efforts by investors. For example, referrals of friends in distant cities to Opportunity Meetings appeared to be a feasible means of securing income from recruiting.

The District Court carefully evaluated the Bestline materials insofar as they reflected on the issue of what efforts prospective investors would be reasonably led to expect themselves to expend in recruiting other distributors and what efforts they would expect Bestline to exert on their behalf. 412 F.Supp. at 749-754. Most significantly, the Court emphasized that virtually every example contained in the Bestline standardized materials of the high incomes that could be obtained as a Bestline distributor relied upon the profits derived from recruitment of other participants. *Id.* at 754. In so holding, the District Court relied on the interpretation of the *Howey* "solely" language announced in *Turner* and followed in *Koscot* and other cases, noting that even if the efforts expended by a given distributor — providing new prospects and possibly assisting in the closing of the transaction — may have contributed to the success of the common enterprise, and, more particularly, to that investor's profits, the existence of those efforts does not establish that they are "managerial or entrepeneurial in nature, or sufficient to significantly affect the failure or success of the enterprise or venture." *Id.* at 752. If investors are performing strictly ministerial functions which could, in effect, be performed by anyone regardless of his qualifications or capabilities, their personal efforts are not essential to the success of the enterprise. The fact that the failure or success of the Bestline recruiting enterprise was "essentially dependent" on Bestline's expertise is apparent from the promotional materials

and the fact that Bestline and its employees were exerting all of the "managerial or entrepeneurial" efforts which were "essential" to the failure or success of the enterprise was firmly established. *Id.* at 754.

The Fifth Circuit's opinion conflicts with the interpretations of this Court's decisions in *United Housing Foundation, Inc. v. Forman, supra,* and *International Brotherhood of Teamsters v. Daniel, supra,* that are generally accepted by all commentators and Circuit Courts of Appeals, including the Fifth Circuit. *See* Lewis D. Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings,* 65 Geo.L.J. 891, 908 (1977). As stated in *Cameron v. Outdoor Resorts of America, Inc.,* 608 F.2d 187 (5th Cir. 1979):

> The key issue is whether the managerial efforts are functionally essential or undeniably significant to that profit, and it is irrelevant that the investor does "nominal menial effort" that affects profit. *Id.* at 193.

Here, however, the Circuit Court concluded that summary judgment was improper because "there was evidence that might lead the trier of fact to conclude that Bestline intended to dispel (and dispelled) the belief that it was promising profits with no expenditure of effort." 610 F.2d at 1319. This is simply inconsistent with the finding in *Cameron* that "it is irrelevant that the investor does 'nominal menial effort' that affects profit."

The decision in the instant case repeatedly emphasizes the word "solely" in the *Howey* test, although it acknowledges the significant omission of the word by this Court in *Forman:*

> In a footnote, the Court also noted the Ninth Circuit decision in *SEC v. Glenn W. Turner Enterprises, Inc., supra.* The Court stated that the "solely from the efforts of others" from the Howey test was not presented in *Forman* and that it expressed no opinion on the Ninth Circuit's holding. 610 F.2d at 1318 n.20.

This is in conflict with the pronouncement in *Commander's Palace Park v. Girard & Pastel Corp.*, 572 F.2d 1084 (5th Cir. 1978):

> In cases dealing with pyramid sales schemes or referral sales agreements, we have modified this test to allow that the promoter or the third party need expend not the sole efforts, but only the crucial efforts, to produce profits. *Id.* at 1086.

And in *Bell v. Health-Mor, Inc., supra,* the Fifth Circuit noted:

> [T]he assumption that *Howey* requires that the income be derived solely by the efforts of those other than the investor [was] specifically rejected . . . in *Koscot.* 549 F.2d at 346.

The Court of Appeals specifically found that the Bestline Direct Distributorships were "an integral part of its multi-level distributorship system, a species of

pyramid sales schemes." 610 F.2d at 1308. After finding that the Bestline Direct Distributorship was a part of Bestline's pyramid sales scheme, the decision acknowledged the specific holding in *Koscot* that a pyramid distribution system is a security. 610 F.2d at 1316. A reading of the decision, however, would lead one to believe that pyramid franchising schemes are no longer securities in the Fifth Circuit despite the *Koscot* holding, and that it is necessary for a victim of a pyramid franchising scheme to prove there was "no substantial effort by the investor." 610 F.2d at 1320. In contrast, the *Koscot* test related to the "undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." 497 F.2d at 483.

The Court of Appeals found that the lure of "big" profits came not from the opportunity to sell Bestline products to the consuming public but from the opportunity to recruit others who would in turn recruit or sell. 610 F.2d at 1310. However, it is clear that no reasonable investor would seek out "small" profits. There can be no dispute as to the inference that every reasonable investor would seek out "big" profits rather than "small" profits thereby eliminating any question of inference or fact in the case at bar. Therefore, the District Court correctly found on summary judgment that the Bestline Direct Distributorship was a "security."

It is noted that the *Koscot* case consisted of an outright reversal of the District Court's findings that the Koscot distributorship was *not* a security. Clearly, the criteria for reversal of the District Court's findings of

fact differ little from the criteria to be applied in favor of the non-moving party upon motion for summary judgment. Therefore, with *Koscot* for guidance, the District Court in this case was plainly justified in relying upon the *Koscot* criteria for entry of summary judgment. However, the Circuit Court's decision reversing the District Court brings into doubt the applicability of the *Koscot* standards for future litigation.

The Circuit Court reversed the determination by the District Court that the Bestline Direct Distributorships were securities because:

> There were parts of the Bestline presentation which would support a finding by a judge or jury that no reasonable "investor" could have believed that he was relying *solely on Bestline*. . . . [D]ifferent inferences could be drawn from the facts in the record as to whether anticipated profits were to come solely from Bestline's efforts, with no substantial personal effort on the part of the "investor." 610 F.2d at 1319.

Significantly, the Court of Appeals has refocused the *Howey/Forman* test of essential "entrepeneurial or managerial efforts of *others*," *Forman, supra,* 421 U.S. at 852 into "substantial personal effort on the part of the *'investor'*," 610 F.2d at 1319 (emphasis supplied), *without regard for the quality of those efforts.*

Thus there is conflict with *Forman* in two distinct respects: The *Howey/Forman* test is concerned with efforts of those other than the investor while the Fifth

Circuit is concerned with efforts of the investor; the *Howey/Forman* test is concerned with the *quality* of efforts ("entrepeneurial or managerial efforts of others") while the Fifth Circuit focuses on the *quantum* of efforts ("substantial effort by the investor").

The Fifth Circuit justifies its position as emanating from *Forman:*

> The District Court in this case had the benefit of the *Forman* decision before granting summary judgment on the security issue, but it seems not to have grasped the significance of that case. According to the District Court, the language quoted in text meant that the Supreme Court had restated the *Howey* test. "By focusing on the *"quality* of the efforts of others, the Supreme Court read the word 'solely' out of the *Howey* test, it having become so much surplusage, thereby according to its prior *Howey* decision the flexibility originally intended." 412 F.Supp. 737-738. The District Court failed to deal with the remainder of the *Forman* decision, however. 610 F.2d at 1317 n.18.

The approach of the Court of Appeals conflicts with this Court's decision in *SEC v. United Benefit Life Insurance Co.,* 387 U.S. 202, 87 S.Ct. 1557, 18 L.Ed.2d 673 (1967), where each aspect of the "Flexible Fund" was a significant element of the instrument that was sold to the public. This Court there recognized that the insurance aspect of the Flexible Fund "reduce[d] *substantially* the investment risk of the contract

holder," 387 U.S. at 211 (emphasis supplied), and that the contract was "to some degree insured." *Id.* This Court nevertheless held that there was an investment contract.

As a corollary to the role reversal it adopted, the Fifth Circuit's opinion stresses the expectation of a "reasonable investor," not as to derivation of *profits* from the entrepeneurial or managerial efforts of others, but as to the amount of substantial effort to be supplied by the investor. This is not the interpretation generally accepted by other courts. For example, the District Court in *SEC v. Glenn W. Turner Enterprises, Inc.*, 348 F.Supp. 766 (D.Ore. 1972), said:

> It is equally clear from the evidence that the purchasers of the higher-priced Adventures thought they were paying for something more than materials. That something was the *promise and expectation of a return on their investment.* [Emphasis supplied.] *Id.* at 772.

Should the interpretation of *Forman* in the instant case be permitted to stand, it would present a clear sanction of obvious devices for promoters to evade the securities laws. Promoters could structure schemes whereby investors would expect to expend substantial effort along with the contribution of their money. Naive investors would be led to expect that their own efforts were determinative of the success of the investment while in reality, the success or failure of the enterprise would depend on the managerial efforts of the promoters. Clearly, substantial effort does not necessarily entail substantial power to affect the success of the enterprise.

Certainly it is in the public interest to secure uniformity of decisions between circuits and within circuits in the construction of laws which embody

> . . . a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits. *Howey, supra,* 320 U.S. at 299, 66 S.Ct. at 1103.

2. The Decision Below Conflicts with the Decisions of Other Courts of Appeals and of the Supreme Court as to the "Expressly Authorized Exception to the Anti-Injunction Act."

The Circuit Court's analysis of the District Court's issuance of the Preliminary Injunction places significant emphasis on the characterization of this action as a private lawsuit. 610 F.2d at 1332-1334. The panel's conclusion "that for private lawsuits the Securities Exchange Act does not constitute an 'expressly authorized' exception to 27 U.S.C. §2283" (610 F.2d at 1333), is in direct conflict with the holdings in *Machesky v. Bizzell,* 414 F.2d 298 (5th Cir. 1969) and *Tampa Phosphate R.Co. v. Seaboard Coast Line R.Co.*, 418 F.2d 387 (5th Cir. 1969).

Both *Machesky* and *Tampa Phosphate* recognized that the Anti-Injunction Act is inapplicable in extraordinary cases where an injunction against state court proceedings is the only means to avoid grave and irreparable injury. In addition, both cases held that a different result should not obtain when enforcement is

sought by a private party rather than by the Securities and Exchange Commission. 414 F.2d at 288; 418 F.2d at 394. The Fifth Circuit cited with approval the case of *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966), stating:

> [I]n the opinion by Judge Friendly, the court found that §2283 was not a bar to a private action under the Securities and Exchange Act. 418 F.2d at 393.

Additionally, Petitioners note conflict with *SEC v. Wencke*, 577 F.2d 619 (9th Cir. 1978), *cert. denied* 429 U.S. 964 (1978). There the Ninth Circuit squarely approved the District Court's enjoining state court action as an exception to the Anti-Injunction Act. The court observed:

> Rather than a genuine attempt to preserve the property for the corporation's shareholders and creditors, the state receivorship was a protective cloak for Wencke to throw over his continued looting. *Id.* at 622.

In view of the dissipation of assets in the California Fund under the aegis of the California Attorney General and Sylva, the removal of Brassfield's protective cloak accomplished by the Preliminary Injunction would appear to take it outside of 28 U.S.C. §2283. It should be emphasized that shortly before issuing the Preliminary Injunction, the trial court had heard the California Attorney General acknowledge that more than one million dollars had been paid by Bestline to satisfy the liability incurred by Defendant Brassfield prior to his

affiliation with Bestline. This money was paid into another California Restitutionary Plan established by the California Attorney General for distributors of Golden Products, Inc., a completely different pyramid scheme operated by Defendant Brassfield in competition with Bestline. The evidence before the trial court made it clear that neither the California Attorney General nor Sylva was taking any steps to prevent the systemmatic depletion of Bestline's assets which had been occurring up to the time of the issuance of the Preliminary Injunction.

The traditional prerequisite to obtaining an injunction is irreparable injury if equitable relief is denied. *Younger v. Harris*, 401 U.S. 42, 43-44; 91 S.Ct. 746, 750; 28 L.Ed.2d 669 (1971). In order to justify an exception to 28 U.S.C. §2283, the danger of irreparable loss must be both great and immediate. *Id.*, 401 U.S. at 46. The District Court found the circumstances of the instant case sufficient to establish the kind of irreparable injury that had always been considered sufficient to justify federal intervention.

The panel's opinion is also in direct conflict with the holding in *Joiner v. City of Dallas*, 488 F.2d 519 (5th Cir. 1974), as well as this Court's holding in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). In *Joiner*, plaintiffs sought to enjoin state condemnation proceedings in order to protect their property rights. The district court had ruled that an injunction against pending state court proceedings would be barred by 28 U.S.C. §2283, reasoning that 42 U.S.C. §1982 did not apply to property rights. *Joiner v. City of Dallas*, 329 F.Supp. 943, 944

(N.D.Tex. 1971). The Court of Appeals affirmed, 447 F.2d 1403, and this Court without opinion vacated and remanded for reconsideration in light of certain other Supreme Court decisions. *Joiner v. City of Dallas*, 412 U.S. 902, 93 S.Ct. 2298, 36 L.Ed.2d 967 (1973). On remand the Court of Appeals stated:

> Second, *Lynch v. Household Finance Corp.*, held that §1983 protects property rights as well as personal liberties. The issue in *Lynch* was whether, in light of the anti-injunction statute, the District Court had jurisdiction to enjoin a summary pre-judicial garnishment proceeding permitted under Connecticut law but challenged under the due process clause as it applies to the state through the Fourteenth Amendment. The Court held that 42 U.S.C.A. §1983 and 28 U.S.C.A. §1343 provided an exception to the anti-injunction statute to protect property rights as well as personal liberties. Again, the *Joiner* decision was in direct conflict with this holding. 488 F.2d at 520.

Petitioners' reliance upon deprivation of property without due process of law to come within the 42 U.S.C. §1983 exception to the Anti-Injunction Act was summarily discounted (610 F.2d at 1332), reminiscent of the first *Joiner* opinion and in direct conflict with the later, correct *Joiner* decision. *See also Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 300 (5th Cir. 1979).

In view of the above considerations, Petitioners submit that the District Court properly entered the

Preliminary Injunction and that the Panel's decision is not reconcilable with the prior decisions of this Court and of circuit courts of appeal.

Failure to reconcile this conflict can only result in confusion and uncertainty. It is not uncommon in securities fraud actions for the principals to attempt to abscond with as much money as possible when faced with impending litigation. Should injunctive relief become unavailable because of the panel's opinion, an intended purpose of the securities laws would be defeated.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,
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